



OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 15, 2002

Mr. Ronald D. Stutes
Attorney at Law
Brown & Hofmeister, L.L.P.
1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2002-6534

Dear Mr. Stutes:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172265.

The Town of Flower Mound (the "town"), which you represent, received a request for copies of police, autopsy and other reports pertaining to the death of the requestors' son. You claim that the submitted information is excepted from disclosure pursuant to section 552.108 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

We note at the outset that the town did not submit any responsive information to us pertaining to the requested autopsy report and other reports. We, therefore, presume that the town has already provided the requestors with this information to the extent that it exists. If not, you must do so at this time.¹ *See* Gov't Code §§ 552.006, .301, .302; *see also* Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

¹ However, we note that generally autopsy photographs and x-rays are confidential pursuant to section 11 of article 49.25 of the Code of Criminal Procedure. *See* Code Crim. Proc. art. 49.25, § 11. Thus, if the requested autopsy report contains photographs and/or x-rays of the deceased, such photographs and x-rays are confidential, unless the deceased died while in the custody of law enforcement. *See id.* We caution the town that section 552.352 imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352. Prior to releasing this specifically requested information, the town should ensure that it does not contain any such confidential information.

Next, we note that the information at issue contains an affidavit for search warrant. If the affidavit has been properly executed, it is made public by statute. *See* Code Crim. Proc art. 18.01(b). Since the marked affidavit has been properly executed, we conclude that the town must release it to the requestors pursuant to article 18.01(b) of the Code of Criminal Procedure.

We also note that the remaining information at issue contains medical records that are subject to the Medical Practice Act (the "MPA"), subtitle B of title 3 of the Occupations Code. The MPA provides that "a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter." Occupations Code § 159.002(b). This office has concluded that the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). When a patient is deceased, as here, medical records may be released only on the signed consent of the deceased's personal representative. *See* Occ. Code §§ 159.005(a)(5). The consent must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *See* Occ. Code §§ 159.004, .005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. *See* Open Records Decision No. 565 at 7 (1990). Accordingly, we conclude that the MPA information that we have marked may only be disclosed in accordance with the access provisions of the MPA. *See* Occ. Code § 159.005(a)(5), (b); *see also* Open Records Decision Nos. 598 (1991). Absent the applicability of an MPA access provision, we conclude that the town must withhold this marked information pursuant to the MPA.

You claim that the remaining information at issue is excepted from disclosure pursuant to section 552.108(a)(2) of the Government Code. Section 552.108(a)(2) protects records pertaining to criminal investigations or prosecutions that have concluded in a final result other than conviction or a deferred adjudication. Generally, a governmental body claiming section 552.108 as an exception to disclosure of requested information must demonstrate, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement or prosecution. *See* Gov't Code §§ 552.108(a), (b), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). You state that the remaining information at issue pertains to an investigation of a possible crime that did not result in a conviction or deferred adjudication. Based on our review of your representations and the remaining information at issue, we understand the town to assert that this information pertains to a criminal investigation that has concluded in a final result other than conviction or deferred adjudication.

We note that section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *See* Gov't Code § 552.108(c). We believe such basic information refers to the information held to be public in *Houston Chronicle Publishing*

Company v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). See Open Records Decision No. 127 (1976) (summarizing types of basic information that must be made available to public). Accordingly, with the exception of basic information that must be released to the requestors, we conclude that the town may withhold the remaining submitted information pursuant to section 552.108(a)(2) of the Government Code. See Gov't Code § 552.108(a); *see also* Open Records Decision Nos. 372 at 4 (1983) (stating that section 552.108 may be invoked by any proper custodian of related information), 493 at 2 (1988), 272 (1981); Attorney General Opinion MW-575 at 1-2 (1982) (construing statutory predecessor).

In summary, the town must release the requested autopsy report and other reports to the extent that they exist and have not already been provided to the requestors. The town must release to the requestors the marked affidavit for search warrant pursuant to article 18.01(b) of the Code of Criminal Procedure. Absent the applicability of an MPA access provision, the town must withhold the MPA information that we have marked pursuant to the MPA. With the exception of basic information that must be released to the requestors, the town may withhold the remaining submitted information pursuant to section 552.108(a)(2) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report

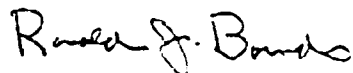
that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 172265

Enc. Marked documents

cc: Mr. and Ms. Ross Johnson
3709 Palmetto Court
Denton, Texas 76210
(w/o enclosures)